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Indexed as:  
K.S.S. (Re)

IN THE MATTER OF an appeal by K.S.S.  
AICAC File No. AC-96-11

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[1996] M.A.I.C.A.C.D. No. 35

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Manitoba Automobile Injury Compensation Appeal Commission  
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, Q.C.,  
and L. Goodspeed  
Heard: September 9, November 5 and December 4, 1996.  
Decision: December 23, 1996.  
(8 pp.)

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Issue(s) :

Suspension of I.R.I. and rehabilitation benefits due to  
the Appellant failing to follow or participate in a  
prescribed rehabilitation programs.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.  
36, ss. 160(e) and 160(g).

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Appearances:

Manitoba Public Insurance Corporation ('M.P.I.C.')

represented by Keith Addison.

Israel A. Ludwig, appeared on behalf of the appellant.

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MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE  
PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING  
PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

#### REASONS FOR DECISION

THE FACTS:

[para1] The Appellant was involved in an automobile  
accident on April 1st, 1994 and suffered injuries to his neck  
and back. His primary occupation is that of a [text deleted]  
for [text deleted] and he also owns and operates the [text  
deleted]. On the date of the accident the Appellant was  
operating his cab when a pickup truck cut him off and forced  
him to the side of the road, causing injuries.

[para2] Shortly after the accident the Appellant consulted Dr. Chung, his family physician, and he prescribed medication and physiotherapy twice a week. The Appellant then started at the Rebound Physiotherapy Clinic ('Rebound') for his treatments.

[para3] The Appellant was not able to return to his job of driving taxi because of his back problems until later in the year but was able to work in a limited fashion at his [text deleted]. Evidence at the hearing indicated that because of his injuries and back pain K.S.S. was doing little more than supervising the shop and he hired staff to perform most of the jobs he had done prior to the accident namely, lifting, cleaning, testing and setting up the merchandise.

[para4] Manitoba Public Insurance Corporation ('M.P.I.C.') was advised by the physiotherapist from Rebound on September 2nd, 1994 that K.S.S. was on an active exercise program and that he still had a very limited range of motion in his spine. She also advised that she did not know when he could return to his night duties as a [text deleted].

[para5] Upon receiving this information M.P.I.C. sent the Appellant to see Dr. Locht, an orthopaedic surgeon at the Winnipeg Clinic. In his report dated September 15th, 1994 he makes the following observation:

"[K.S.S.] continues to suffer from the effects of the motor vehicle accident of April 1st, 1994. He appears to have suffered musculoligamentous strains to his upper and lower spine from which he has not as yet fully recovered. There do not appear to be any underlying pre-existing conditions delaying his recovery. Physiotherapy has been taken for several weeks and has provided little relief. In my opinion this form of treatment should not continue."

[para6] Dr. Locht recommended that the Appellant should return to work as a [text deleted] on a limited basis and over time increase his workload.

[para7] Given the findings of Dr. Locht M.P.I.C. made arrangements for the Appellant to attend at the Canadian Back Institute for a rehabilitation assessment on December 16th, 1994. Their report dated December 16th, 1994 acknowledges that the Appellant has not [text deleted] since the accident and recommend that "In order for him to return to work he should be enrolled in a work conditioning program which would address education regarding proper sitting, sleeping, and standing postures, followed by flexibility". The Back Institute later recommended on December 22nd, 1994 that it would "place [K.S.S.] in our Comprehensive Rehabilitation Program (CPR) attending the Canadian Back Institute for 4

hours per day, 5 days per week for 4-6 weeks in duration." This recommendation was conveyed to Dr. Chung by M.P.I.C. and he agreed with same.

[para8] The Appellant started his program in the first week of January 1995 but did not attend on a regular basis as was required. He was advised verbally and in writing during January and February by the Adjuster for M.P.I.C. that he had to attend all of the sessions and could not miss any if the program was to be successful. The hours of attendance were varied to accommodate K.S.S. but this did not seem to cure his absenteeism problem.

[para9] On February 24th, 1995 the Canadian Back Institute advised Dr. Chung and M.P.I.C. that they were discharging K.S.S. from the program because "The treatment team feels that no progress was made with the program instituted for K.S.S. His attendance was poor and this seemed to be a barrier to him responding to the program".

[para10] Based on the Appellant's refusal to fully participate in the rehabilitation program, M.P.I.C. terminated his I.R.I. benefits on February 19th, 1995. He had been receiving Income Replacement Indemnity ('I.R.I.') from shortly after the accident until February 19th, 1995.

[para11] After being discharged by the Canadian Back Institute the Appellant attended at Dr. Chung's office. Dr. Chung recommended that he go back to physiotherapy at Rebound, and he did. K.S.S. started in March 1995, but he did not keep many of his scheduled appointments. Mr. Berzish, Director of Physiotherapy Services for Rebound, states in a letter of September 14th, 1995 that they had treated K.S.S. from May 31st, 1994 to August 9th, 1995 as a result of his accident on April 1st, 1994 and "Of these 109 appointments that K.S.S. scheduled he attended 62 appointments. He had phoned to cancel 16 appointments and did not appear 31 other times, without notifying our office that he would not be able to attend. ... In twelve years of practice as a physiotherapist, it has been my experience that in order to progress a patient's program properly, you need compliance from the patient with respect to exercise as well as attendance". Attached to the letter was a list of dates attended, cancelled and 'no shows' by K.S.S. M.P.I.C. terminated payment for any further treatments.

[para12] The Appellant on his own started to take physiotherapy treatments at the Rebound on January 12th, 1996. A short time after the start of this program the Appellant pleaded successfully with the Adjuster for M.P.I.C. to pick up the cost of these treatments. The Adjuster warned the Appellant that he had to attend all of the scheduled sessions or the program would be of no use to him in helping him in his recovery. The Appellant assured the Adjuster that

he would attend the full program.

[para13] The Appellant reverted to form and did not attend the program on a regular basis and in a report from Rebound to M.P.I.C. on October 31st, 1996 they advised that K.S.S. had missed 13 of 22 scheduled appointments from January 12th to the end of February. This pattern of infrequent or sporadic attendance continued until October 1996 when Rebound cancelled his program because they advised there were no further benefits to continuing his physiotherapy. Mr. Berzish of Rebound stated in the aforementioned report :

"To summarize, [K.S.S.'s] attendance since my last letter has been sporadic. He demonstrated poor knowledge of an exercise program he has been on since January 1996, and supposedly doing on a regular basis. If there is any legitimate loss of movement, I would attribute it to inconsistency with his home exercise program in both technique and frequency".

[para14] M.P.I.C. terminated the Appellant's benefits pursuant to Section 160, subsections (e) and (g):

160 The corporation may refuse to pay compensation to a person or may reduce the amount of indemnity or suspend or terminate the indemnity, where the person

(e) without valid reason, refuses, does not follow, or is not available for medical treatment recommended by a medical practitioner and the corporation;

(g) without valid reason, does not follow or participate in a rehabilitation program made available by the corporation.

[para15] The Appellant appealed his loss of I.R.I. and rehabilitation benefits. The Appellant testified during the hearing that the reason he missed all of the appointments was due to the advice that he received from Dr. Chung. He states that Dr. Chung told him not to attend any treatment if "he was in pain or not feeling well, then he could stay home". Dr Chung, in his testimony, advised that the only advice he gave the Appellant was to the effect that he could miss his treatments if he was in so much pain that he could not get out of bed or his house. He denied giving K.S.S. the blanket excuse referred to above. Dr. Chung advised that he had given the Appellant only three notes excusing him from participating in his rehabilitation program on three separate dates. Dr. Chung agreed that some degree of pain was a natural concomitant of the rehabilitation program and that he would never have given the advice that the Appellant alleged.

[para16] The Adjuster for M.P.I.C. denied that the Appellant told him that on the advice of Dr. Chung he could

miss his treatments if he was not feeling well or was in pain. The Adjuster went to great lengths to determine why K.S.S. did not attend his programs and from his evidence it would appear that he never received any reasons or answers. He acknowledged that he had received or had seen notes from Dr. Chung excusing the Appellant from a certain number of his appointments. Mr. Berzish of Rebound advised that he "had no written or verbal communication from anyone telling K.S.S. not to exercise if he was in pain".

[para17] The evidence shows that the Appellant did not have a valid reason for missing his treatments during four separate programs arranged for and paid by M.P.I.C. Except for a few limited circumstances the Appellant, for his own reasons, missed a sufficient number of treatments that impaired his ability to recover to his pre-accident level.

[para18] M.P.I.C. was attempting to get the Appellant, via numerous rehabilitation programs, back to work both as a [text deleted] and the full time operator of his [text deleted]. When the problem of the Appellant's lack of attendance in the various programs arose the Adjuster for M.P.I.C. counselled the Appellant on numerous occasions that he had to participate fully in all of the programs if he wanted to get back to his pre-accident status. He was warned that failure to fully participate would lead to his being cut off from any further benefits from M.P.I.C. This was communicated in writing on several occasion to the Appellant. The Appellant, for his own reasons, even after he had been reinstated to another rehabilitation program in January 1996, refused to attend on a regular basis and as a result was not able to get the full benefits he should have in order to help him recover.

[para19] We find that M.P.I.C. had met the onus that it has to meet under this section of the Act and that the Appellant did not have any valid reasons for not participating fully in his rehabilitation programs. We therefore dismiss the Appellant's appeal.

DISPOSITION:

[para20] We therefore confirm the Acting Review Officer's decision of February 13th, 1996.

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